with those decisions, correctly held that the instant case was ripe for review.

The Tenth Circuit correctly applied the Court's two-prong test for ripeness: (1) the fitness of the issue for adjudication; and (2) the hardship to the parties of withholding judgment. Consistent with this Court's ruling in *Pacific Gas*, the Tenth Circuit found that the issue of preemption was predominantly legal, making it unnecessary to wait for the pertinent state agencies to define or analyze the subject self-executing statutes before adjudication. Also, the Tenth Circuit correctly found that the hardship prong of the test was satisfied because the Respondents' continued expenditure of time, energy, and money to obtain an NRC license would work a direct and substantial hardship on them as their efforts would be futile if the Utah statutes are found to be valid. Accordingly, the Tenth Circuit properly found that the issue was ripe for review.

Petitioners' entire brief is primarily devoted to an argument on the merits. Only at the very end do they set forth any reason for review, claiming a conflict between the circuits. However, no conflict exists between the preemption decision of the Tenth Circuit and the decisions of other circuits. The cases cited by Petitioners (*Kerr-McGee Chemical Corp. v. City of West Chicago*, 914 F.2d 820 (7th Cir. 1990) and *Citizens for an Orderly Energy Policy, Inc. v. County of Suffolk*, 813 F.2d 570 (2d Cir. 1987)) are clearly distinguishable from this case. Not only is the Tenth Circuit decision not in conflict with these cases, but its decision is clearly consistent with these holdings.

The decision of the Tenth Circuit was also correct and consistent with this Court's prior preemption decisions. Contrary to Petitioners' assertion, Respondents did not present a purely facial challenge to the Utah statutory scheme. Therefore, the Tenth Circuit's evaluation was consistent with this Court's decisions. The Tenth Circuit thoroughly examined the federal regulation of nuclear power and the Supreme Court decisions that addressed the preemptive effect of this extensive federal regulatory scheme. Those decisions were *Pacific Gas, Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), and *English v. General Electric Co.*, 496 U.S. 72 (1990). The Tenth Circuit examined very carefully each of the laws the Petitioners sought to defend and ruled consistently with these decisions that each is preempted by federal law.

Based on the foregoing, Respondents respectfully request that this Court deny the petition for writ of certiorari.

## ARGUMENT

### I. THE TENTH CIRCUIT'S DECISION THAT THE CASE WAS RIPE FOR REVIEW DOES NOT CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS OR OF THIS COURT, NOR IS THERE ANY OTHER BASIS FOR REVIEW.

Petitioners failed to provide any reason the Tenth Circuit's decision on ripeness justifies granting a writ of certiorari.[1] Instead, Petitioners base their argument solely

[1] The Tenth Circuit upheld the District Court's finding that Respondents had standing to challenge the subject Utah statutes and

(Continued on following page)

on the merits. The applicable standard for determining ripeness stated by the Tenth Circuit is consistent with this Court's rulings, as well as the rulings of every other circuit, and the Tenth Circuit's decision gives rise to no other justification for review.

### A. The Tenth Circuit Applied the Appropriate Standard for Determining Ripeness in Accord with the Decisions of this Court and Other Circuits.

The Tenth Circuit properly applied the well-established ripeness standard articulated by this Court to find that this case was ripe for review. Specifically, the Tenth Circuit ruled that: (1) the issue of preemption in this case was predominantly a legal question fit for adjudication; and (2) the hardship to Respondents that would result from delaying a ruling on the merits made the case ripe for review. App. 21a-24a.

As expressed by this Court, the doctrine of ripeness "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 200 (1983) (quoting *Abbott Laboratories v. Gardner*, 387 U.S.

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regulations. App. 21a-24a. Petitioners do not dispute the Tenth Circuit's ruling or otherwise address the issue of standing in their Petition. Consequently, Petitioners have waived any right to challenge Respondents' standing to bring this case, and such is not properly before the Court. *See Izumi v. U.S. Philips Corp.*, 510 U.S. 27 (1993); *Clark v. City of Draper*, 168 F.3d 1185, 1186, n.1 (10th Cir. 1999); *see also* Sup. Ct. Rule 14. Accordingly, Respondents' arguments in this section shall solely address the issue of ripeness as challenged by Petitioners.

136, 148-49 (1967), *overruled on other grounds*, 430 U.S. 99 (1977)). Resolving a question of ripeness requires the application of the well-established two-prong test which considers: (1) the fitness of the issue for adjudication; and (2) the hardship to the parties of withholding judgment. *Id.* at 201 (citing *Abbott*, 387 U.S. at 149); *see also United States v. Wilson*, 244 F.3d 1208, 1213 (10th Cir. 2001).

Every circuit in the United States adheres to these ripeness principles and applies the two-prong analysis espoused in *Abbott* to resolve issues of ripeness. *See Rhode Island Ass'n of Realtors, Inc. v. Whitehouse*, 199 F.3d 26, 33 (1st Cir. 1999); *United States v. Quinones*, 313 F.3d 49, 58 (2d Cir. 2002); *Peachlum v. City of York, Pa.*, 333 F.3d 429, 434 (3d Cir. 2003); *Arch Mineral Corp. v. Babbitt*, 104 F.3d 660, 665 (4th Cir. 1997); *Groome Res. Ltd., L.L.C. v. Parish of Jefferson*, 234 F.3d 192, 199 (5th Cir. 2000); *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1170-71 (6th Cir. 1983); *Triple G Landfills, Inc. v. Bd. of Comm'rs of Fountain County, Ind.*, 977 F.2d 287, 289 (7th Cir. 1992); *Nebraska Pub. Power Dist. v. Mid-American Energy Co.*, 234 F.3d 1032, 1037-38 (8th Cir. 2000); *State of Cal. ex rel. State Water Res. Control Bd. v. F.E.R.C.*, 966 F.2d 1541, 1562 (9th Cir. 1992); *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1499 (10th Cir. 1995); *Alabama Power Co. v. United States Dep't of Energy*, 307 F.3d 1300, 1310 (11th Cir. 2002); *Nat'l Recycling Coalition, Inc. v. Browner*, 984 F.2d 1243, 1249 (D.C. Cir. 1993).

This was the standard applied by the Tenth Circuit as well. Thus, no conflict exists between the decision of the Tenth Circuit, the decisions of this Court, and the decisions of other circuits.

The Petitioners make no effort to challenge the applicability of *Abbott*. Instead, Petitioners erroneously argue that because there are possible future contingencies, the preemption issue is not fit for adjudication and Respondents have not and would not suffer any hardship if a decision on the merits of preemption were forestalled. The Petitioners are simply wrong, and their conclusions are unsupported in fact or law.

### B. The Tenth Circuit Applied the *Abbott* Test for Ripeness Consistent with this Court's Decisions to Determine that the Preemption Issues in this Case Were Ripe for Review.

Through the application of the *Abbott* test, the Tenth Circuit found, consistent with this Court's application, that the case was ripe because: (1) the issue of preemption in this case was purely a legal question fit for adjudication; and (2) the Respondents would suffer a substantial hardship if a ruling on the merits was delayed. App. 21a-24a.

Consistent with this Court's ruling in *Pacific Gas*, the Tenth Circuit found that in this case the issue of preemption was purely legal, making it unnecessary to wait for the pertinent state agencies to define or analyze the subject self-executing statutes before adjudication. App. 23a-24a (citing *Pacific Gas*, 461 U.S. at 201); *see also Freehold Cogeneration Assocs. v. Bd. of Regulatory Comm'rs of N.J.*, 44 F.3d 1178 (3d Cir. 1995) (preemption is a legal issue not requiring further development by responsible agency).

In addressing the first prong of the *Abbott* test Petitioners contest the Tenth Circuit's ruling and take the position that any contingency as to whether a given law will be applied makes such law unfit for adjudicative review. Pet. 16 (citing *Texas v. United States*, 523 U.S. 296, 300 (1998)). Petitioners' reliance on *Texas* is misplaced. The contingency in *Texas* related to the ultimate interpretation and application of the subject statute, which itself was not self-executing and required substantial factual development to understand. *Texas*, 523 U.S. at 300-01. In *Texas* it was not even certain to whom the laws were intended to apply. *Id.*

In contrast, the Utah statutes require no factual development to see that the many self-executing provisions impose immediate injury. As a result the Tenth Circuit appropriately found that the issue of whether PFS could legally proceed to obtain a federally issued license from the NRC for the storage of SNF, without adhering to the exceedingly onerous and prohibitory Utah statutes, was a legal issue fit for adjudication. App. 23a-24a.

Consistent with this Court's decisions, the Tenth Circuit also correctly found that the hardship prong of the *Abbott* test was satisfied. The Tenth Circuit determined that withholding judgment on the issue of preemption would work a hardship on Respondents because their continued expenditure of time, energy, and money to obtain an NRC license would be futile if the Utah statutes are found to be valid. App. 24a (citing *Pacific Gas*, 461 U.S. at 201). Respondents' actions would be futile because the substantial expense and burden of complying with the Utah legislation would likely strip PFS of its ability to continue with its project. *Id.*

As the Tenth Circuit noted, the Utah statutes are self-executing and undisputedly require, among other things, a $5 million application fee, a 75 percent transaction fee, a cash bond of at least $2 billion, and a fee equal to 75 percent of the unfunded liability. Furthermore, they prohibit Utah counties from providing any services to the proposed PFS facilities. App. 22a. Therefore, the potential effect on PFS if the Utah statutes are not found to be preempted is certain. Consequently, the outcome of the *Abbott* test in *Texas* provides no guidance in this case.

Accordingly, the Tenth Circuit properly found that the issue of preemption is a purely legal question fit for adjudication and the hardship to Respondents certain. App. 21a-24a. For that reason the issue of preemption was ripe, and the Tenth Circuit was correct in ruling that Respondents are entitled to know whether the Utah legislative scheme was constitutional and enforceable.

## II. THE TENTH CIRCUIT'S DECISION REGARDING PREEMPTION IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND THE OTHER CIRCUITS AND NO OTHER REASON FOR REVIEW HAS BEEN RAISED.

Petitioners do not provide any persuasive reason justifying this Court's grant of a writ of certiorari in this case. Petitioners' brief is primarily an argument on the merits. As an eleventh-hour effort, at the end of their brief Petitioners make a claim that the Tenth Circuit's preemption decision conflicts with decisions of other circuits. This is the only reason for review provided by Petitioners. However, Petitioners' argument is misplaced as the cases cited are distinguishable. Therefore, Petitioners' argument must fail.

### A. No Conflict Exists between the Preemption Decision of the Tenth Circuit Court of Appeals and the Decisions of Other Circuits or this Court.

In its decision, the Tenth Circuit provided a thorough examination of the federal regulation of nuclear power and the Supreme Court decisions that address the preemptive effect of this extensive regulatory scheme. The Tenth Circuit's decision then meticulously examines each law Petitioners sought to defend and applies the rulings of this Court in making its decision that the laws are preempted. The Tenth Circuit's application was not only consistent with this Court's decisions, but also with the decisions of other circuits.

Petitioners claim that the Tenth Circuit's preemption decision in the instant case conflicts with *Kerr-McGee Chemical Corp. v. City of West Chicago*, 914 F.2d 820 (7th Cir. 1990), and *Citizens for an Orderly Energy Policy, Inc. v. County of Suffolk*, 813 F.2d 570 (2d Cir. 1987). Petitioners' reliance is in error as these decisions are clearly distinguishable.

*Kerr-McGee* involved a challenge to a municipality's erosion and sedimentation regulations that were on their face "completely 'radiation neutral.'" *Kerr-McGee*, 914 F.2d at 821, 824 (ruling that municipal ordinance that on its face targets only health and safety hazards unrelated to hazards created by radiation is not preempted). Contrary to the Petitioners' assertions, the city's regulations were not upheld because there was a way in which the city's regulations could be applied to address matters other than radiological safety hazards, but rather because the regulations had nothing to do with radiological safety hazards.

They were "completely 'radiation neutral'" and applied to all construction projects within the city. They were not created and adopted specifically to impede a nuclear-related facility as Utah's statutes were.

Furthermore, in *Kerr-McGee*, the NRC had specifically included compliance with the city's erosion and dust ordinances in Kerr-McGee's license. *Id.* at 822-23. Accordingly, the Seventh Circuit ruled that the city's code was not preempted, but limited to the extent that it did not involve aspects of the project that "directly involve radiation hazards (including those 'inextricably intermixed' with non-radiation hazards) and [were] not selected for scrutiny by the City merely to delay or frustrate the project as a whole." *Id.* at 827.

None of the statutes at issue in this case concerns neutral, previously-existing land-use, environmental, tort, or other traditional state laws not based on radiological safety. On the contrary, the Utah statutes were created and adopted specifically to address radiation hazards. App. 93a-95a, 105a-106a, 108a, 110a-113a, 119a-121a. Also, as pointed out by the Tenth Circuit, Petitioners failed to point out any evidence supporting a non-safety rationale. App. 38a. Thus, *Kerr-McGee* is inapplicable.

*Suffolk* involved a set of county-adopted resolutions pursuant to which the county refused to participate in the off-site radiological emergency evacuation planning for a nuclear power plant. *Citizens for an Orderly Energy Policy, Inc. v. County of Suffolk*, 604 F. Supp. 1084, 1088 (E.D.N.Y. 1985). Plaintiffs sued, asking the court to find that the county's resolutions were preempted by the Atomic Energy Act. *Id.*

The district court noted the uniqueness of the case because it involved the county's refusal to participate in emergency planning for a nuclear plant rather than an affirmative action that was challenged. *Id.* at 1094. In its decision, the district court noted that a local government could not establish itself as a second nuclear regulatory authority with safety requirements over and above those of the NRC. *Id.* In its analysis, the court examined the legislative history and found that because Congress was concerned that a municipality would frustrate the process by refusing to cooperate in emergency planning for nuclear facilities, it reached a compromise and "[r]ather than require participation [in emergency planning], Congress provided that the utility could provide a plan." *Id.* at 1095-96. The Second Circuit affirmed the decision for the same reasons set forth in the district court's opinion and ruled that the county had not affirmatively prevented the utility from pursuing its license or obstructed that pursuit. *Suffolk*, 813 F.2d 570, 571 (2d Cir. 1987).

Contrary to the premise of *Suffolk*, Petitioners have taken direct affirmative action deliberately intended to interfere with Respondents' Project. App. 94a, 101a, 126a-127a; Appellees' Br. at 10, 13-16, 19-21. Petitioners did not and cannot point to any legislative history demonstrating their action was specifically contemplated and allowed for in the Atomic Energy Act. App. 39a, 40a. *Suffolk* is clearly distinguishable and no conflict exists among the circuits.

### B. The Decision of the Tenth Circuit Court of Appeals Was Correct and Consistent with this Court's Preemption Decisions.

The Tenth Circuit began its assessment of the preemption issue with an examination of the general principles of

preemption articulated by this Court. The Tenth Circuit then turned its examination to the federal regulation of nuclear power and this Court's decisions relating to preemption in this arena. Finally, the Tenth Circuit applied the rulings of those decisions to the instant case. Therefore, Petitioners' claim that the Tenth Circuit used the wrong standard of review must fail.

Petitioners have incorrectly characterized this case as a purely facial challenge, rendering their reliance on *California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572 (1987), misplaced. In *Granite Rock*, the Court considered whether its jurisdiction fell within its authority under 28 U.S.C. § 1254(2) "to review the decision of a federal court of appeals by appeal if a state statute is held by a court of appeals to be invalid as repugnant to the Constitution, treaties or law of the United States." *Id.* at 578-79 (internal quotations omitted). The Court of Appeals had found that the California Coastal Commission's exercise of permitting requirements was preempted by federal law but did not invalidate any of the California law. *Id.* at 579. Therefore, the United States Supreme Court found that *Granite Rock* was a case in which "an exercise of authority under state law is invalidated without reference to the state statute." *Id.* (internal quotations omitted).

The Court specifically noted that because of the posture of the case, Granite Rock did not argue that any conditions in particular conflicted with federal statutes or regulations, and the record did not disclose any particular conditions that might be placed on Granite Rock. *Id.* at 579-80. Instead, Granite Rock argued that there was no possible set of conditions that the California Coastal Commission could have placed on its permit that would

not conflict with federal law. *Id.* at 580. Thus, the Court characterized *Granite Rock* as a "purely facial challenge" to the California permit requirement. *Id.* This is in marked contrast to the issue before the Court in this Petition.

Contrary to Petitioners' assertions, Respondents did not launch a purely facial challenge to the Utah statutory scheme. We need not speculate as to the nature of the requirements of the statutes at issue nor wait to discover what conditions might be placed on Respondents. Those requirements and conditions are clearly embodied in the statutes in no uncertain terms, as is the statutory intent to protect the health and welfare of Utah citizens. Furthermore, those conditions are already affecting Respondents.

The factual record set forth by Respondents below demonstrates with particularity how the requirements and conditions of those statutes currently affect Respondents and how they are clearly grounded in nuclear safety concerns. Appellees' Br. at 25-29. Accordingly, the *Granite Rock* standard for preemption is inapplicable in this case, and the Tenth Circuit Court of Appeals correctly applied this Court's preemption decisions of *Pacific Gas*, *Silkwood*, and *English*.

In its decision, the Tenth Circuit analyzed each of the statutory provisions the Utah officials claimed were not preempted. App. 25a, 35a-52a. After a thorough examination of the federal regulation of nuclear power (App. 27a-30a) and the Supreme Court's decisions that addressed the preemptive effect of this extensive federal regulatory scheme, *Pacific Gas*, *Silkwood*, and *English* (App. 30a-35a), the Tenth Circuit applied the rulings of those cases

to the specific statutes the Utah officials sought to defend in their appeal. App. 35a-52a.

As recognized by the Tenth Circuit, the laws created and passed by the State of Utah are all distinguishable from the laws examined by the Court in *Pacific Gas*, *Silkwood*, and *English*. App. 38a, 39a, 42a, 45a, 47a. *Pacific Gas* dealt with decisions made by a state concerning the "[n]eed for new power facilities, their economic feasibility, and rates and services," all of which have been characteristically governed by states. *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983). In ruling against preemption, the Court found that California had not sought to impose its own standards on nuclear waste disposal, but had accepted federal responsibility to develop and license this technology. *Id.* at 219. This is in marked contrast with the laws imposed by Petitioners.

As the Tenth Circuit pointed out, in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), and *English v. General Electric Co.*, 496 U.S. 72 (1990), the laws examined were traditional state laws concerning tort liability and damages that had existed long before the federal government began regulating nuclear power and that applied no matter what the cause of the harm. App. 39a. Unlike this case, the laws under consideration in *Silkwood* and *English* were not laws directed toward stifling the nuclear industry. Also, as the Tenth Circuit emphasized, *Silkwood* and *English* relied on evidence of Congressional intent that the specific state law remedies in question be preserved. App. 39a. The opposite is true of the Utah statutes.

Contrary to Petitioners' assertions, the purpose of the state law is very important to the determination of

whether the state law in question is preempted. *English*, 496 U.S. at 84 (noting that "part of the pre-empted field is defined by reference to the purpose of the state law in question"). The preempted field is also defined by whether the state's law has some "direct and substantial effect on the decisions made by those who build or operate nuclear facilities concerning radiological safety levels." *Id.* at 85. The Tenth Circuit examined very carefully each of the laws the Utah officials sought to defend and ruled consistently with the preemption decisions of this Court, ruling that each is preempted by federal law.

## CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court deny the petition for writ of certiorari.

Respectfully submitted, November 30, 2004.

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No. 04-575

IN THE

# Supreme Court of the United States

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DIANNE R. NIELSON, in her official capacity as Executive Director of the Utah Department of Environmental Quality, *et al.*,
*Petitioners*,

v.

PRIVATE FUEL STORAGE, L.L.C., and SKULL VALLEY BAND OF GOSHUTE INDIANS,
*Respondents*.

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

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## REPLY BRIEF FOR PETITIONERS

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IN THE

# Supreme Court of the United States

No. 04-575

DIANNE R. NIELSON, in her official capacity as Executive Director of the Utah Department of Environmental Quality, *et al.*,
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v.

PRIVATE FUEL STORAGE, L.L.C., and SKULL VALLEY BAND OF GOSHUTE INDIANS,
*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

## REPLY BRIEF FOR PETITIONERS

The petition seeks review of the Tenth Circuit's sweeping preemption of five groups of state statutes that have not yet been applied to respondents, may never be applied, and can be applied without regulating radiological safety aspects of respondents' proposed (but not federally approved) facility, thus respecting the distinctly limited reach of preemption under the Atomic Energy Act. The case for review rests on the Tenth Circuit's violation of this Court's precedents, clear conflicts with other circuits, and the sheer importance of the Tenth Circuit's abrogation of state authority over real problems created by the proposed open-air nuclear waste storage facility in Utah. Respondents have supplied no meaningful answer.

The brief in opposition is an exercise in studied avoidance. It rewrites this Court's three preemption-limiting decisions on AEA preemption; disregards the Court's standard for facial preemption; never mentions the Court's key recent rulings on ripeness; tries to dismiss the intercircuit conflict by ignoring other circuits' express rationales; diverts attention from the state statutes actually at issue in favor of other provisions not at issue; and repeatedly declares, summarily, that the Tenth Circuit correctly reviewed the provisions at issue, but never offers any substantive discussion whatever to show that invalidation of each provision at issue comported with facial preemption standards. Respondents' choice so steadfastly to avoid grappling with the governing law, the specifics of the laws at issue, and the actual holdings of other circuits strongly confirms the error, and need for review, of the Tenth Circuit's blunderbuss displacement of vital state authority.

## ARGUMENT

1. To defend the Tenth Circuit's ripeness conclusion, respondents have to ignore what this Court's governing precedents say about critical elements of the ripeness analysis, as if reciting "fitness" and "hardship" ended the analysis. Br. in Opp. 6-11. Respondents cite *Texas v. United States*, 523 U.S. 296, 300 (1998), but they ignore its clearly articulated principle that a claim is not ripe if it rests on contingent events that may never occur or may not occur as anticipated. Br. in Opp. 10. They never even mention the Court's two recent ripeness rulings, *National Park Hospitality Ass'n v. Department of the Interior*, 538 U.S. 803 (2003), and *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726 (1998), which make clear the insufficiency of legal uncertainty for the hardship element and the importance of avoiding foreclosure of agency opportunities to shape their potential actions to eliminate possible legal objections. *See* Pet. 16-18. The Tenth Circuit's ripeness ruling conflicts with the ripeness analysis of those decisions.

Two contingencies make respondents' claim unripe under the straightforward *Texas* principle. *First*, respondents may never receive federal approval for their project, in which case the Utah laws will not apply to them at all. Yet the Tenth Circuit nevertheless went ahead and swept away five groups of Utah laws. *Second*, the Utah laws at issue have not yet been applied to respondents; and how they will be applied, and what impact they will have, are profoundly uncertain. Although respondents insist that the laws are "self-executing" (Br. in Opp. 10), insisting cannot make it so. Respondents refuse to discuss the specifics of the provisions at issue—under which it has yet to be decided what if any requirements, beyond informational matters, will be included in the county plans; whether municipal services will be denied and, if so, whether respondents can readily fill the void on their own; what if any unfunded potential liability the State will determine and what effect that determination will have on equity investors, officers, and directors; what if any restrictions the State will place on use of the roads newly under its authority; what if any requirements, beyond informational or non-radiological safety ones, will be imposed in the state licensing process. Nor has any payment obligation under the licensing provisions been triggered, because respondents' project may fail to obtain federal disapproved, mooting the entire state licensing process. Pet. 5-7 (summarizing provisions at issue).

These undeniable contingencies not only make *Texas* applicable; the Utah-law contingencies also present the situation found key to lack of ripeness in *Ohio Forestry*, a decision that respondents simply ignore. The Utah laws at issue do not currently command or forbid respondents to do anything, and in each of the just-enumerated respects, Utah organs of government have not yet made the determinations that will settle how the provisions at issue will apply to respondents. *Ohio Forestry* recognizes that a central basis for the ripeness requirement is, in circumstances like the present, to protect

government agencies' opportunities to shape their own decisions to avoid alleged legal problems before federal courts jump in. Pet. 17. The intervention of the Tenth Circuit deprived Utah of that opportunity, although respondents undisputedly could challenge any application of particular provisions if and when it occurs.

As to hardship, respondents assert "immediate injury," Br. in Opp. 10, but they identify no present hardship, let alone a substantial one. They all but acknowledge the absence of any such present hardship when they cap their discussion by saying that "the *potential* effect" if the statutes are upheld "is certain." Br. in Opp. 11 (emphasis added). The effect is thus only a potential, not a present one. In the end, all that respondents (and the Tenth Circuit) rely on is respondents' uncertainty about their legal rights with respect to the Utah laws (which if valid respondents assert might render their NRC licensing efforts "futile"). Br. in Opp. 10. That uncertainty, however, is not a sufficient hardship under the clear ruling in *National Park Hospitality Ass'n* (quoted at Pet. 18) —a decision respondents never even cite, much less discuss.

Respect for these ripeness principles is at least as important where state laws are at issue as where federal laws are at issue. In this circumstance, federalism limits add to the institutional constraints on judicial review of government action generally. These principles should preclude review even of a question, like the facial preemption question here, that, properly formulated (are the laws *capable* of valid application?), can and should readily be answered *against* the challengers—though the intrusion on the State is of course less if the State prevails on the merits. Here, though, the Tenth Circuit did not properly formulate the question, but relied for its ruling on predictions about how the laws would be applied and what effects would follow (all without any factual record). *See* Pet. 15 & n.7. The Tenth Circuit decision thus violates fundamental ripeness principles.

2. On the merits of the preemption issue, respondents can defend the Tenth Circuit's ruling only by running from this Court's standards. *First*, they try to escape the clear articulation of the standard for facial preemption in *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987), *i.e.*, no possible valid application of the challenged state laws. *See* Pet. 20; *see also Department of Taxation and Finance of New York v. Milhelm Attea Bros., Inc.*, 512 U.S. 61 (1994). They contend that the standard is somehow tied to the threshold issue of "appeal" jurisdiction this Court decided in *Granite Rock*. Br. in Opp. 15-16. But there is no such dependency: the facial-preemption standard is laid out in sections of *Granite Rock* (480 U.S. at 581, 588, 593) separate from the jurisdictional discussion (*id.* at 579-80). Moreover, although respondents declare that they are not making a "purely facial challenge" (Br. in Opp. 16), they do not explain how that can be so. The laws at issue have not been applied to respondents, who, therefore, can only be making a facial preemption challenge.

The *Granite Rock* standard—followed in many circuits (where no issue of "appeal" jurisdiction exists), Pet. 28-29, as respondents do not deny—thus necessarily governs. Yet the Tenth Circuit did not frame its analysis in those terms, and respondents do not even attempt to show how the five groups of Utah laws at issue could fail under *Granite Rock*'s standard allowing facial preemption only if there is no possible set of valid applications. The petition shows how each set of Utah laws can be validly applied (Pet. 24-26), and respondents do not meet that showing. The Tenth Circuit decision thus necessarily violates the governing standard for facial preemption challenges.

*Second*, respondents also must ignore the actual AEA preemption standards laid out in this Court's decisions in *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983), *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), and *English v.*

*General Elec. Co.*, 496 U.S. 72 (1990)—all of which rejected preemption claims. Respondents recognize that the Tenth Circuit's wholesale invalidation of the Utah laws at issue rests squarely on an understanding of the AEA as barring a State from having "an alternative regulatory process" applicable to nuclear facilities (Br. in Opp. 2) or from regulating in a way that is specific to nuclear facilities or "directed toward stifling" a nuclear facility (Br. in Opp. 14, 17). That view, however, is plainly contrary to *Pacific Gas*, *Silkwood*, and *English*. *See* Pet. 21-23.

Most starkly, *Pacific Gas* involved—and upheld—a state measure that was specific to nuclear facilities and on its face designed to stop them. The Court squarely held that, because the nuclear-targeted ban regulated a non-radiological safety aspect of such facilities, the State could legitimately target nuclear facilities and block them. *Pacific Gas* in terms, and by its holding, rejected respondents' broad no-dual-regulation, no-targeting-of-nuclear-projects, view of the AEA. *Silkwood* then recognized that Congress had also left to the States the area of monetary remedies for injuries, even injuries caused by jury-determined radiological safety deficiencies. As always, a case-specific conflict-preemption analysis remains available, with the focus on actual interference with federal objectives, as the Court explained, construing *English*, in *Gade v. National Solid Wastes Mgt. Ass'n*, 505 U.S. 88, 105 (1992). *See* Pet. 21-23.

The five groups of Utah laws at issue cannot possibly be condemned as incapable of valid application under those distinctly limited AEA preemption standards. Respondents make no attempt to argue otherwise. While diverting attention to provisions *not* at issue (Br. in Opp. 3 (contract provision)),[1] they never even discuss the specifics of the

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[1] As respondents are aware, Utah specifically told the Tenth Circuit that, once federal legal authority to license the facility was judicially

provisions actually at issue, let alone meet the petition's showing that every one of the five categories is, in fact, readily capable of valid application, *i.e.*, without regulating the radiological safety hazards of nuclear projects. Pet. 24-27. Respondents advert without elaboration to effects of the laws even before they have been applied (Br. in Opp. 16), but an argument about effects (especially a wholly speculative one, unsupported by any factual record) is a premature argument for conflict preemption based on the particular determinations Utah may make in applying the provisions—necessarily an as-applied argument that cannot support facial preemption.

Respondents, in short, recognize that the Tenth Circuit decision necessarily rests on the broad view of AEA preemption that they advance, which is in plain terms contrary to the governing law under this Court's precedents.

3. Respondents do not deny that other circuits apply the *Granite Rock* standard for facial preemption that the Tenth Circuit here disregarded. That is one doctrinal conflict. Respondents do seek to deny the conflict of the Tenth Circuit ruling with the AEA-specific decisions of the Second and Seventh Circuits. Br. in Opp. 12-14. The actual stated rationales of the decisions, however, unavoidably conflict with the Tenth Circuit's pre-application condemnation and its sweeping purpose-driven view of AEA preemption.

*Kerr-McGee Chemical Corp. v. City of West Chicago*, 914 F.2d 820 (7th Cir. 1990), rejected a facial challenge to a locality's requirement that a nuclear facility seek a permit. The Seventh Circuit stated the limited reach of AEA preemption: "the NRC has exclusive authority to regulate radiation hazards associated with the materials and activities covered by the AEA, but states and local agencies retain the right to

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confirmed, the contract provision would not be applicable at all. Utah CA Br. 20; Utah CA Reply Br. 39.

regulate non-radiation hazards." *Id.* at 825. It specifically refused to hold the permitting requirement invalid on the ground that it was masking true opposition to the facility. *Id.* at 827. And it rejected the challenge precisely because the terms of the permitting statute *allowed* the City to apply it validly, respecting the line defining AEA preemption, so that the challenger had to await actual application of the permit requirement to their facility. *Id.* at 826-27. The Tenth Circuit, had it followed that approach, could not have struck down the five groups of laws at issue—all of which are capable of being applied without regulating radiological safety. Pet. 24-26.

The Second Circuit's decision in *Citizens for An Orderly Energy Policy, Inc. v. County of Suffolk*, 813 F.2d 570 (2d Cir. 1987), by respondents' own description conflicts with the Tenth Circuit's decision. Respondents recognize that the Second Circuit decision rests on acknowledged congressional intent not to require local governments to lend assistance to nuclear projects, distinguishing affirmative local government interference with such projects. Br. in Opp. 14. As in *Kerr McGee*, (undisputed) allegations of a true motivation to oppose the project were not enough to support preemption. *See* Pet. 28. The Utah provision on refusing municipal services is plainly on the protected side of the *Citizens* line and thus squarely within an area left unpreempted by Congress. The Tenth Circuit could not have held otherwise had it followed the Second Circuit's *Citizens* decision.

4. Respondents ignore other factors supporting review. *First*, they say nothing about the fact that the Federal Government, while participating as *amicus* below, did not advocate ripeness or preemption in this case. Nor do they address the views expressed by the United States elsewhere that run counter to the Tenth Circuit's interventionist approach to preemption here. *See* Pet. 29-30.

*Second*, respondents fail to recognize that, in the AEA preemption arena, this Court has granted review even in the absence of a circuit conflict. There was no conflict alleged in support of certiorari in *Pacific Gas*. *See* Petition for Certiorari in No. 81-1945 (April, 20, 1982); Brief for the United States as *Amicus Curiae* in Nos. 81-1944, 81-1945 (May 22, 1982) (recommending grant; no mention of conflict). Nor was a conflict alleged in *Silkwood*. Jurisdictional Statement in No. 81-2159 (May 20, 1982). Indeed, the Court granted review of the Tenth Circuit's overbroad view of AEA preemption in *Silkwood* even though the Solicitor General's invitation brief recommended denial of review. *See* Brief for the United States as *Amicus Curiae* Supporting Appellees in No. 81-2159 at 35 (June 1983) (recommending summary affirmance if "appeal" was proper and denial of certiorari otherwise).

The Court explained the reasons it deemed sufficient to warrant review in *Silkwood*:

> The issue addressed by the court below is important; it affects both the States' traditional authority to provide tort remedies to their citizens and the Federal Government's express desire to maintain exclusive regulatory authority over the safety aspects of nuclear power.

464 U.S. at 248. In the present case, too, important state authority has been broadly displaced, including authority to ensure the availability of meaningful remedies for harm, and the boundaries of exclusive federal authority over the safety aspects of nuclear power have been newly expanded (even without the United States urging movement of those boundaries to trump the Utah laws at issue). Those consequences are particularly compelling reasons for review of the decision in this case, which sweepingly invalidates numerous measures responding to real problems caused by respondents' proposed major new nuclear facility, and which runs afoul not only of